

STATE OF MICHIGAN  
IN THE SUPREME COURT

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KRISTINE COWLES, an individual, on behalf  
of herself and all others similarly situated,

Plaintiff/Appellee,

v

BANK WEST, a state savings bank, f/k/a Bank  
West, F.S.B.,

Defendant/Appellant,

and

KAREN B. PAXSON, an individual, on behalf  
of herself and all others similarly situated,

Plaintiff-Intervenor/Appellee,

v

BANK WEST, a state savings bank, f/k/a Bank  
West, F.S.B.,

Defendant/Appellant.

Supreme Court No. 127564

Court of Appeals No. 229516

Kent County Circuit Court  
Case No. 98-06859-CP

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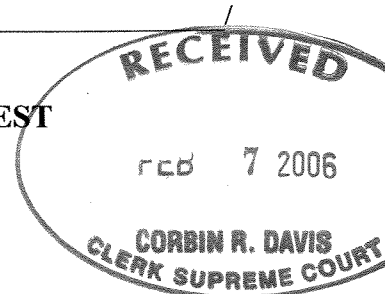
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**REPLY BRIEF OF DEFENDANT-APPELLANT BANK WEST**



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## ARGUMENT

### I. THE CLASS ACTION TOLLING DOCTRINE DOES NOT ENCOMPASS PAXSON'S TILA CLAIM.

Plaintiffs are simply incorrect in arguing that *American Pipe & Construction Co v Utah*, 414 US 538, 553 (1974), and *Crown, Cork & Seal Co v Parker*, 462 US 345 (1983), “unambiguously and completely support Paxson’s position.” (Appellee’s Br at 14.) Neither of those cases addressed the specific issue presented here, i.e., the extent to which a statute of limitations is tolled for claims the class representatives did not, and could not, assert.

The United States Supreme Court did resolve this key question in *Johnson v Ry Express Agency, Inc*, 421 US 454, 466 (1975), when the Court rejected a petitioner’s reliance on *American Pipe* and refused to toll the limitations period for a § 1981 claim on the basis of petitioner’s original filing of a Title VII claim: “the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* [*v New York Central RR Co*, 380 US 424 (1965)] depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted.” *Johnson*, 421 US at 467 (emphasis added).

Plaintiffs argue that *Johnson* lacks precedential value because *Johnson* involved individual claims rather than class claims – as though tolling is easier in a class setting. But tolling in a class context actually presents far greater difficulties, because the plaintiffs must give the defendant adequate notice of claims. *Crown Cork*, 462 US at 352, citing *American Pipe*, 414 US at 555 (“a class complaint ‘notifies the defendants not only of the substantive claims brought against them, but also the number and generic identities of the potential plaintiffs who may participate in the judgment.’”). *Accord Burnett*, 380 US at 428.

For example, an individual suing a defendant on theory “A” as it relates to a specific transaction or occurrence could perhaps argue that the defendant should anticipate an

amendment stating another liability theory. It is much more difficult for a plaintiff to make that argument in a class action, because a defendant sued by a class representative has no basis for assuming that the case will eventually involve claims that the individual has not and could not assert. The class representative (who cannot raise such claims) must, under applicable court rules, have claims that are “typical of the claims . . . of the class.” MCR 3.501(a)(1).<sup>1</sup>

Thus, the *Johnson* court’s conclusion that one claim does not toll the limitations period on a different claim for that same individual becomes even more compelling in a class context, as a federal court recently held in rejecting the very argument Plaintiffs advance here:

Plaintiffs dispute the precedential effect of *Johnson*, arguing that the holding does not apply because ‘that case did not involve the tolling effect of a prior class action’ . . . . Plaintiffs’ argument is unpersuasive. In *Johnson*, the Court cited *American Pipe*, a class action tolling case, as support for the proposition that having identical causes of actions is an important consideration when deciding whether to allow a tolling benefit. *Johnson*, 421 US at 467. Requiring identical causes of action is reasonable. . . . Thus, to claim a tolling benefit from a previous class action, the legal theory on which the class action plaintiffs sued *must* be the same as the theory used by the plaintiffs claiming the tolling benefit.”

*Southwire Co v JP Morgan Chase & Co*, 307 F Supp 2d 1046, 1062-1063 (WD Wis, 2004) (emphasis added).

Federal and state courts throughout the country have similarly recognized the class action tolling doctrine’s dependence on the assertion of identical claims. *See, e.g., Raie v Cheminova, Inc*, 336 F3d 1278, 1283 (CA 11, 2003) (*American Pipe* tolling not permitted because a wrongful death claim under Florida law was distinct from originally asserted product liability claims); *Weston v AmeriBank*, 265 F3d 366, 368-369 (CA 6, 2001) (*American Pipe* tolling not permitted because federal TILA claim was not the same as the state law claims

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<sup>1</sup> Note the identical language in the Federal Rules at issue in *Johnson*, Fed R Civ P 23(a)(3).

alleged in the initial complaint); *Southwire*, 307 F Supp 2d at 1062-1063 (to claim a tolling benefit from a previous class action, the legal theory on which the class action plaintiffs originally sued must be the same as the theory used by the plaintiffs claiming the tolling benefit); *Jolly v Eli Lilly & Co*, 751 P2d 923, 936 (Cal, 1988) (no *American Pipe* tolling where original class action complaint neither sufficiently put defendants on notice of the substance and nature of plaintiff's newly asserted personal injury claims, nor served to advance economy and efficiency of litigation); *Singer v Eli Lilly & Co*, 549 NYS2d 654, 659-661 (NY App Div, 1990) (same).

In fact, the Sixth Circuit has explicitly stated that “[u]nder *American Pipe*, the statute of limitations for putative class members of the original class is tolled only for substantive claims that were raised, or could have been raised, in the initial complaint.” *Weston v AmeriBank*, 265 F3d 366, 368 (CA 6, 2001) (emphasis added). Any extension of the class action tolling doctrine that would permit Paxson to now assert her stale TILA claim, which Cowles did not and could not have asserted, would thus contradict not only the United States Supreme Court decision in *Johnson*, but the Sixth Circuit decision in *Weston* as well.

Plaintiffs attempt to distinguish the present case from the above-cited authority, arguing that the “scenario here is different: the substitute representative assumes the **original claim** of the **original representative** in the **original suit**. (Appellee’s Br at 16, emphasis in original.) But the TILA claim Ms. Paxson now seeks to assert was not an original claim of the original representative in the original suit; the original suit did not involve any TILA claims. *Cowles v Bank West*, 263 Mich App 213, 217; 687 NW2d 603 (2004) (listing Ms. Cowles’ allegations in her original complaint, which do not include a TILA claim). It is improper to toll

the statute of limitations to allow a TILA claim that Ms. Cowles did not assert, and could not have asserted, in her original complaint.<sup>2</sup>

Plaintiffs' other arguments regarding the applicability of the class action tolling doctrine are equally misplaced. For example, Plaintiffs cite a number of cases for the proposition that an unnamed class member may be substituted for the original class representative when the original representative's individual claim is found to be time-barred. (Appellee's Br at 12-13.) This point does not avail Paxson at all. To begin, the majority of the cited cases cited do not even involve the class action tolling doctrine.<sup>3</sup> And of those that do, *Haas v Pittsburgh National Bank*, 526 F2d 1083 (CA 3, 1975), and *McKowan Lowe & Co v Jasmine Ltd*, 295 F2d 380 (CA 3, 2002), involved claims identical to those in the initial complaint. In fact, the original complaint in *Haas* provided the defendant with notice of "the claims against which [the defendant] would be required to defend" and also "the number and generic identities of the potential plaintiffs." *McKowan*, 295 F2d at 385 (citing *Haas*, 526 F2d at 1097). Plaintiffs have cited no law that would allow them to circumvent the problem presented here, that "the original illegitimate complaint never provided notice of the possibility that the new claim, based on totally different legal grounds, might later arise." *Cowles*, 263 Mich App at 239 n 2; 687 NW2d 603 (O'Connell, J, dissenting) (citing *American Pipe*).

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<sup>2</sup> Perhaps Ms. Paxson is arguing that Cowles eventually amended to include this stale claim. If so, that argument is also unavailing. The Circuit Court realized it was error to permit such an amendment, a conclusion Plaintiffs do not contest. An erroneous decision that is withdrawn cannot revive a stale claim. In addition, the Sixth Circuit has made it abundantly clear that for purposes of *American Pipe* tolling, the court must look to the claims alleged in the "initial complaint." *Weston*, 265 F3d at 368 (emphasis added).

<sup>3</sup> As already noted, when an individual asserts a claim arising out of a particular transaction or occurrence, he or she has a better argument for tolling with regard to a new claim related to the same occurrence than here, where Plaintiffs must argue that one person's claim put defendant on notice that another, unnamed person had a completely different claim.

Plaintiffs also assert that this Court need not be concerned with “never-expiring class claims propounded by inventive class counsel wielding a hydra of creative legal theories.” (Appellee’s Br at 17.) In fact, quite the opposite is true. If Ms. Paxson can artificially extend the length of her one-year limitations period by asserting her “stale TILA claim as though the legal fiction of class status can somehow resurrect it,” the door is open to creative class counsel to continuously revive a failed complaint with new class representatives asserting completely new legal theories, just as Judge O’Connell predicted. *Cowles*, 263 Mich App at 240; 687 NW2d at 617 (O’Connell, J, dissenting).

Finally, Plaintiffs’ substantial reliance on *American Pipe* is misplaced, because if Plaintiffs’ views of the “relation back” principle are correct, the class action tolling doctrine the United States Supreme Court articulated in *American Pipe* would be complete superfluous:

The Court would not need to create a tolling principle if the intervenor’s complaint simply related back to the filing of the original complaint. The Court held that, since the original plaintiffs filed eleven days prior to the expiration of the limitations period, the intervenors had eleven days from the denial of the class certification motion to file their motions to intervene. Thus, the *American Pipe* decision implicitly rejects the notion that statutes of limitation are not an appropriate consideration on a motion to intervene.

*Flower Cab Co v Petite*, 1987 WL 14715, at \*6 (ND Ill, July 21, 1987) (emphasis added).

Although Bank West explained this reality in its initial merits brief, Plaintiffs ignore it. That avoidance is with good reason, because Plaintiffs have no response. Accordingly, this Court should reverse the decision of the Court of Appeals and adopt the dissenting opinion below of Judge O’Connell.

**II. A DOCUMENT PREPARATION CHARGE IS “BONA FIDE” IF THE SERVICES FOR WHICH THE CHARGE WAS RECEIVED WERE ACTUALLY PERFORMED.**

Ms. Paxson’s TILA claim fails on its merits in any event. Plaintiffs do not and cannot dispute that Bank West actually prepared the documents for which it charged a fee. They do not and cannot dispute that the fee Bank West charged was reasonable in comparison to fees charged by the other financial institutions in the area. (In fact, the charge is identical to the one the Sixth Circuit held completely lawful in *Brennan v Hampton Mortgage Co*, 287 F2d 601 (CA 6, 2003).) Plaintiffs do not and cannot dispute that the purpose of the TILA is to provide customers with an easy comparison of lending terms so that customers can compare the terms of credit on an “apples to apples” basis, and that all financial institutions are therefore required to report their charges on the same basis. Plaintiffs do not and cannot dispute that the purpose of TILA is best served by allowing – even requiring – Bank West to report the document preparation fee as they did. Including all or a part of that fee in the finance charge, as Plaintiffs suggests, leads to an invalid comparison among competitors, thwarting TILA’s very purpose.

Instead, Plaintiffs argue only that (a) the federal Sixth Circuit Court of Appeals has somehow affirmed our Michigan Court of Appeals, and therefore this Court should pay no attention to either the purpose of TILA, the admitted competitive environment, or the Seventh Circuit authority on point, and (b) that a Bank West officer “spoke candidly about the rationale behind the \$100 fee” (Br at 5) and “testified unambiguously” (Br at 11) that the fee was to defray costs well beyond those of document preparation. Neither of these points is valid.

Plaintiffs first rely on *Inge v Rock Financial*, 388 F3d 930 (CA 6, 2004), for the proposition that the issue here addressed – the appropriate standard for determining whether a charge is “bona-fide” under TILA regulations – is now “a settled question of federal law . . . that has already been resolved by the circuit in which the Court sits.” *Inge* did no such thing; it

merely recited the erroneous test applied by the Michigan Court of Appeals, and, using the “Michigan” subjective test, held the document preparation charge in that case was bona fide. The opinion did not mention the objective test or *Guise v BMW Mortgage, LLC*, 377 F3d 795 (CA 7, 2004). It did not compare and contrast the two tests, or decide which of the two is appropriate considering the purpose of TILA. The decision has no bearing whatsoever on this Court’s interpretation of TILA’s plain language.<sup>4</sup>

The real issue here is reasonableness, not bona fides. Plaintiffs’ argument is that the document preparation charge covered some expenses associated with the lending process *in addition to* the admitted document preparation services. This argument is nothing more than a recasting of Plaintiffs’ rejected “reasonableness” argument, i.e., that the charge exceeded the cost of preparing the documents. If a charge is partially “for” other services, it of necessity exceeded the cost of the services billed. Conversely, if the charge exceeded the cost of the services performed, the excess accounted for costs, overhead, or profit, i.e., the excess was “for” something else. So Plaintiffs’ argument that “the fee covered other costs” is simply a recasting of their losing argument that “the fee exceeded costs.” And a “fee exceeding costs” does not make it unlawful, notwithstanding the fact that the excess covers something else.

If Plaintiffs’ position was correct, the Sixth Circuit would have held the fee illegal in *Brannam v Huntington Mortgage Co*, 287 F3d 601 (CA 6, 2002). There, Huntington Mortgage Company charged the same \$250 for document preparation services that Bank West charged here. The *Brannam* plaintiffs argued that the lender “may only charge as a document

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<sup>4</sup> The *Inge* decision did, however, make one interesting finding in holding the fee was bona fide: “Indeed, Plaintiff’s proposed fourth amended complaint alleges that Defendant prepared the promissory note and mortgage that she signed at closing.” So the *Inge* plaintiffs failed both the objective (“were the documents actually prepared”) and the subjective (“what do bank people think”) tests.

preparation fee the amount of the lender's actual costs for preparing loan related documents.” *Id.* at 606. If they were right, that charge covered something else – either other costs or overhead or profit. But that did not make the charge illegal. As *Inge* and *Brannam* before it have confirmed, a charge is not unreasonable because it exceeds the cost of the services mentioned, even if the excess is logically “for” something else. The charge is reasonable if “it was for a service actually performed and reasonable in comparison to the prevailing practices of the industry in the relevant market.” *Brannam*, 287 F3d at 606. Surely Plaintiffs cannot turn a losing argument into a winner simply by describing a sum of money not by how it came into being, but by saying that the excess was used for something else. Plaintiffs’ attempt to recast the lost reasonableness argument as a bona fides argument should be rejected.

Mr. Sydloski’s testimony is irrelevant for this reason, but also for its substance. There are a total of 23 pages of his testimony that the parties consider important, collected in the appendices, 10 by Plaintiffs and 13 by Bank West. It takes little time to read them all, and Bank West submits they cannot be read to support the conclusions Plaintiffs reach. What that review demonstrates is that (a) the testimony upon which Plaintiffs rely was not testimony regarding facts, but subjective beliefs, (b) even that testimony is taken out of context, and (c) the facts do not support Plaintiffs’ characterization.

Plaintiffs characterize Mr. Sydloski as testifying to the factual history of the purpose of the charge. Mr. Sydloski did no such thing. When asked point blank about the rationale for the charge, he testified “Obviously I can’t recall exactly what happened” seven years before. (Sydloski Dep at 31, Appellee’s App, p 4b.) He testified that he “can’t recall the exact analogy that my mind went through except to say that we needed to charge some fees because we had taken on all this additional expense . . . .” (Sydloski Dep at 31-32, Appellee’s

App, pp 4b-5b.) Mr Sydloski, in discussing the purpose of the charge, was simply expressing a belief and opinion, not a fact: “In my opinion, it was to cover the defrayment of the cost . . .” and “I believe it’s the opinion of the bank that the charges are to defray the expenses. That’s my personal opinion now, that it’s consistent.” (Sydloski Dep at 124, Appellee’s App, p 8b.) There can be no fair reading of his testimony that suggests he was giving a factual history.

But whether Mr. Sydloski was testifying to facts or opinion, he did not testify that the charge included some portion to do things other than document preparation. He repeatedly used the term “defray” to opine on the relationship between the charge and a bucket of costs that included both document preparation costs and other costs. Plaintiffs highlight Mr. Sydloski’s testimony in describing those other costs as including “the whole gamut of jobs that are done by the financial institution to get the loan to be ready to close.” (Appellant’s B at 6) Plaintiffs construe that statement to mean that Mr. Sydloski was of the opinion that a portion of the charge specifically related to these other costs. But that is not what Mr. Sydloski said. He said that the charge was to cover only a “part of the costs.” (Sydloski Dep at 33, Appellant’s App, p 85a.) At only one place in the entire deposition did he testify as to what he meant by using the term “defray,” and in this important testimony, he also describes how the charge related to expenses:

Based on his analysis, the cost was in excess of \$600 and therefore the fees that we were charging were well within -- it was doing what it was supposed to do to help defray the expenses. Certainly didn’t cover all of the expenses.

(Sydloski Dep at 127, Appellant’s App at 95a.)<sup>5</sup>

Mr. Sydloski’s testimony, and the current dispute over its proper characterization, illustrates the need for using an objective test to determine if a charge is bona fide. A valid

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<sup>5</sup> Plaintiffs also argue that the Bank, post-litigation, renamed the charge. (Appellee’s Br at 8.) But Plaintiffs quote only a part of the testimony, the full extent of which discloses that it was a different charge – different in amount, content, and treatment.

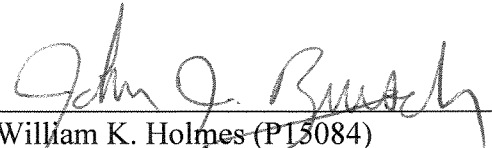
consumer comparison of identical services and identical costs by competing banks should be based on the facts, and it should not be skewed by something as ephemeral and contested as class counsel's construction of opinion testimony given seven years after the fact.

### CONCLUSION

For all of the foregoing reasons, this Court should reverse.

Date: February 7, 2006

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ADDENDUM

**H**

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern  
 Division.

FLOWER CAB COMPANY, Checker Taxi  
 Company, Inc., and Yellow Cab Company,  
 Plaintiffs,

v.

Karen PETITTE, Individually and as Commissioner,  
 Department of Consumer  
 Services of the City of Chicago, and the City of  
 Chicago, Defendants.

No. 82 C 4538.

July 21, 1987.

# MEMORANDUM OPINION AND ORDER

NORDBERG, District Judge.

\*1 In July of 1982, the plaintiffs instituted this action pursuant to 42 U.S.C. § 1983 to contest the Commissioner of the Department of Consumer Services of the City of Chicago's ("the Commissioner") unilateral imposition of a moratorium on the transfer of taxicab licenses. Plaintiffs Checker Taxi Company, Inc. ("Checker") and Yellow Cab Company ("Yellow") were contractual sellers of the taxicab licenses, and plaintiff Flower Cab Company ("Flower") was a prospective purchaser of the licenses. On March 27, 1987, this court granted Checker and Yellow's motion for summary judgment with respect to Count I of the complaint, which alleged that the imposition of the moratorium violated plaintiffs' due process rights under the Fourteenth Amendment to the United States Constitution. One month later, Kenneth Cooper, another prospective purchaser of a 1982 taxicab license, filed a petition to intervene "individually and on behalf of all persons similarly situated" pursuant to Fed.R.Civ.P. 24(a) or (b). The City strongly objects to this petition to intervene. For the reasons set forth below, the court finds that Cooper's petition does not meet the timeliness requirements of Rule 24, and denies his petition to intervene.

## *Procedural Background*

The factual and procedural background of this

lawsuit is set forth in the court's March 27, 1987 memorandum opinion and order:

The underlying facts of this case are undisputed. Checker is one of the largest taxicab operators in the City of Chicago. At the time of the events in question, it owned 1,500 of the City's 4,600 taxicab licenses. In mid-1981, it decided to assign some of its licenses pursuant to the existing procedure set forth in chapter 28 § 28-9.1 of the Municipal Code of the City of Chicago. Checker notified the City of its plan to assign a minimum of three hundred licenses in July of 1981, and frequently conferred with City officials over the next six months to discuss the assignments (Feldman Aff. Ex. A). On February 10, 1982, Karen Petite, the Commissioner, wrote to Checker indicating approval of the contemplated assignments (Feldman Aff. Ex. B). Between March and June of 1982, Checker attended several meetings with City officials. At no time did the City give any indication that it would seek to prevent or prohibit the contemplated assignments. On July 9, 1982, Checker representatives met with then Mayor Jane Byrne, the Commissioner, and members of the City's Corporation Counsel, none of whom mentioned any disapproval of the assignments or possible impediments to the proposed transfers (Feldman Aff. ¶¶ 5-9).

On July 13, 1982, Checker contracted to assign thirteen taxicab licenses to Flower Cab Company ("Flower"). Flower filed applications for processing the assignments with the Commissioner two days later. The Municipal Code of the City of Chicago, chapter 28, § 28-9.1 permitted assignment of these licenses if the assignee met certain standard qualifications. These applications generally required two to five days to process. The routine nature of the processing of assignments is evidenced by the fact that, in the three years prior to Flower's application, the City had processed every application for assignment filed with the Commissioner.

\*2 An ordinance prohibiting the sale, transfer or assignment of any taxicab licenses was introduced in the City Council on the same day that Flower filed its applications with the Commissioner. On July 16, 1982, the Commissioner announced a moratorium on the processing of all applications for assignment and refused to consider Flower's applications because of the pendency of the ordinance. As a result, Flower

and Checker filed this action pursuant to § 1983 for injunctive relief.

This court issued a preliminary injunction on July 26, 1982, ordering the Commissioner to process Flower's applications by August 6, 1982, in the ordinary course of its established procedure, thereby returning the parties to the status quo prior to the moratorium. The Seventh Circuit granted the City's motion for a stay pending appeal, *Flower Cab Company v. Petite*, 685 F.2d 192 (7th Cir.1982), and denied plaintiffs' subsequent motion to vacate and rehear *en banc*. *Flower Cab Company v. Petite*, No. 82-2208 (7th Cir. Aug. 20, 1982) (unpublished order).

On September 14, 1982, the City Council conducted a hearing on the proposed ordinance. Plaintiffs were afforded the opportunity to participate in the hearing. At the hearing, the Commissioner testified that the new ordinance was drafted "in response to a plan by one of the cab companies [Checker] to sell its medallions at prices of up to \$15,000 per medallion, a matter which was viewed by at least some as windfall profits for the cab companies." (Transcript of September 14, 1982 Hearings Before the Committee on Local Transportation, at 7). The City Council passed the proposed ordinance on September 15, 1982. The ordinance contained several amendments to the taxicab licensing procedure; the most significant changes for the purposes of this lawsuit are the repeal of chap. 28 § 28-9.1 and the creation of a new provision retroactively banning all transfers of licenses as of July 15, 1982, the date of the moratorium.

The Seventh Circuit vacated this court's July 26, 1986 preliminary injunction in an unpublished order of October 7, 1982. *Flower Cab v. Petite*, No. 82-2208 (7th Cir. October 7, 1982) (unpublished order). Noting the change in circumstances created by the passage of the September 15 amendments, the court remanded the action to this court to consider the validity of the new ordinance and its effect on this litigation. On remand, the plaintiffs filed an amended complaint attacking the validity of the ordinance, and the court granted plaintiffs' motion to add Yellow Cab Company as a party plaintiff.

The plaintiffs then renewed their motion for a preliminary injunction, and the defendants filed a motion to dismiss the amended complaint. The court denied both motions in a memorandum opinion and order entered June 17, 1983. With respect to the motion to dismiss, the court held that Count I of the

amended complaint adequately stated a cause of action under § 1983 and that the ordinance did not moot the amended complaint. See *Flower Cab Company v. Petite*, No. 82 C 4538, slip op. at 3-9 (N.D.Ill. June 17, 1983) ["*Flower Cab I*"]. The court also denied plaintiffs' motion for a preliminary injunction, finding that the plaintiffs had failed to establish that they had no adequate remedy at law and they would be irreparably harmed if an injunction did not issue. *Id.* at 12-14.

\*3 *Flower Cab Company v. Petite*, No. 82 C 4538, slip op. at 2-5 (N.D.Ill. March 27, 1987) (footnotes omitted) ("*Flower Cab II*"). The June 17, 1983 order also denied the motion to dismiss Count II, which alleges that the September 15, 1982 ordinance creates an unconstitutional impairment of contract. *Flower Cab I*, slip op. at 9-12.

The court's March 27, 1987 memorandum opinion and order held that the taxicab companies' interest in the licenses and their transferability constituted a protectable property right protected by the Fourteenth Amendment. *Flower Cab II*, slip op. at 7-17. The court also held that the Commissioner's unilateral imposition of this moratorium violated Checker and Yellow's rights to substantive and procedural due process. [FN1] *Flower Cab II*, slip op. at 17-22. The court reiterated its June 17, 1983 holding that plaintiffs were not entitled to injunctive relief from the unconstitutional moratorium, and scheduled a hearing for a determination of the damages stemming from the moratorium. *Flower Cab II*, slip op. at 22-24. The parties were in the process of preparing their evidence on the damages issue when Cooper filed his petition to intervene.

#### *Petition To Intervene*

Cooper seeks leave to intervene in this action either as of right under Fed.R.Civ.P. 24(a), or permissively under Fed.R.Civ.P. 24(b). [FN2] Cooper's proposed complaint seeks to convert this individual suit instituted by two plaintiff cab companies [FN3] into a huge class action, with over five hundred proposed class members. A party seeking to intervene as of right must establish (1) that his application is timely; (2) that he has an interest in the property or transaction that is the subject of the lawsuit; (3) that disposition of the action will impair his ability to protect his interest; and (4) that his interest is not adequately represented by the existing parties to the lawsuit. *United States v. City of Chicago*, 798 F.2d 969, 972 (7th Cir.1986). "Failure to satisfy any one of these requirements is sufficient grounds to deny [the motion to intervene.]" *Id.* The City's primary

objection to intervention is that Cooper's motion, filed four years and nine months after this litigation was commenced, cannot satisfy Rule 24's "timeliness" requirement.

In NAACP v. New York, 413 U.S. 345, 365-66, 93 S.Ct. 2591, 2602-2603 (1973), the Supreme Court held:

Intervention in a federal court suit is governed by [Rule] 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on appeal.

\*4 See also City of Bloomington, Indiana v. Westinghouse Electric Corp., No. 85-2881, slip op. at 6-7 (7th Cir. June 19, 1987); 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1996 at 422-23. The purpose of the timeliness requirement is to "prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." United States v. South Bend Community School Corp., 710 F.2d 394, 396 (7th Cir.1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707 (1984). This Circuit follows a four-part test to determine whether an application to intervene meets the timeliness component of Rule 24:

'[T]he length of time the intervenor knew or should have known of his or her interest in the case; the extent of prejudice to the original litigating parties from the intervenor's delay; the extent of prejudice to the would-be intervenor if his or her motion is denied; and any unusual circumstances.'

City of Bloomington, slip op. at 7, quoting United States v. Kemper Money Market Fund, Inc., 704 F.2d 389, 391 (7th Cir.1983). See also United States v. City of Chicago, 798 F.2d 969, 975 (7th Cir.1986); South v. Rowe, 759 F.2d 610, 612 (7th Cir.1985). Applying these factors to the present case, the court agrees with the City that Cooper's motion clearly fails to satisfy Rule 24's requirement of "timeliness."

#### 1. Length of Time Cooper Knew of His Interest

Cooper alleges that, like Flower, he entered into a contract to purchase a medallion shortly before the moratorium was announced. His application for a transfer was denied as a result of the moratorium, and the City returned his assignment documents to him on July 16, 1982. In November of 1982, he received a refund for the initial deposit made in contemplation of obtaining a medallion. He admits that his constitutional claims against the City arose in July of 1982; yet he chose to wait until April of 1987 to assert his claim.

It is clear that, if Cooper attempted to file an action independent of this suit, it would be barred by the statute of limitations. This action is based on alleged violations of 42 U.S.C. § 1983. In Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985), the Supreme Court held that § 1983 suits are governed by the state statute of limitations for personal injury suits. In Illinois, the statute of limitations for personal injury suits is two years. Ill.Rev.Stat. ch. 110, ¶ 13-202. Prior to Wilson, the Seventh Circuit had held that § 1983 suits were subject to Illinois' five year limitations period for "actions not otherwise provided for." Beard v. Robinson, 563 F.2d 331, 334 (7th Cir.1977), cert. denied, 438 U.S. 907, 98 S.Ct. 3125 (1978). Recently, in Anton v. Lehpamer, 787 F.2d 1141 (7th Cir.1986), the court discussed the retroactive applicability of Wilson to claims which arose before that decision was issued. The court held that, "in Illinois, a plaintiff whose § 1983 cause of action accrued before the Wilson decision, April 17, 1985, must file suit within the shorter period of either five years from the date his action accrued or two years after Wilson." Anton, 787 F.2d at 1141, 1146.

\*5 In the present case, Cooper's class claims arose at the same time the plaintiffs' claims arose--when the moratorium was announced in July of 1982. However, unlike Flower and Checker, he did not file a lawsuit to vindicate his rights; nor did he follow Yellow's example in requesting to be added as a party plaintiff after the Seventh Circuit remanded this action in the fall of 1982. Under the Anton decision, he should have filed suit within the shorter period of July 16, 1987 or April 17, 1987. Because April 17, 1987 is the cut-off under Anton, Cooper's complaint, filed on April 27, 1987, is barred by the statute of limitations, and could not be filed as a separate action. [FN4]

Cooper argues, however, that timeliness in terms of the statute of limitations and timeliness under Rule

24 are two unrelated concepts. According to Cooper, an intervenor's complaint, if allowed, will date back to the filing of the original complaint; and, since Flower and Checker filed their lawsuit within days of the moratorium, their promptness precludes the City from raising any limitations defense against Cooper and his class.

Cooper's "relation-back" argument cannot be reconciled with the Supreme Court's decision in American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756 (1974). In *American Pipe*, the State of Utah instituted a federal antitrust class action on behalf of itself and a class of other public bodies and agencies eleven days prior to the expiration of the statute of limitations. Within eight days of the district court's denial of plaintiffs' class certification motions, several putative class members filed motions to intervene in the action. The district court denied leave to intervene based on the statute of limitations, and the appellate court reversed. The Supreme Court held that the intervenors were not barred by the statute of limitations, because "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." American Pipe, 414 U.S. at 553, 94 S.Ct. at 766.

The Court reasoned that this limited tolling of a limitations period serves to prevent a multiplicity of lawsuits during the pendency of a class certification motion, while preserving the essential policies underlying limitations periods. It held:

[S]tatutory limitation periods are 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights' are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the *number and generic identities* of the potential plaintiffs who may participate in the judgment. *Within the period set by the statute of limitations, the defendants have the essential*

*information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.*

\*6 American Pipe, 414 U.S. at 554-555, 94 S.Ct. at 766-67 (citations omitted) (emphasis supplied). See also Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 352-53, 103 S.Ct. 2392, 2397 (1983). [FN5]

It is clear that, if Cooper's assertion regarding the relation-back of intervenor's complaints were correct, the Supreme Court's entire discussion in *American Pipe* would be unnecessary. The Court would not need to create a tolling principle if the intervenor's complaint simply related back to the filing of the original complaint. The Court held that, since the original plaintiffs filed eleven days prior to the expiration of the limitations period, the intervenors had eleven days from the denial of the class certification motion to file their motions to intervene. Thus, the *American Pipe* decision implicitly rejects the notion that statutes of limitation are not an appropriate consideration on a motion to intervene.

The tolling principles set forth in *American Pipe* cannot assist Cooper's claim, however, because this lawsuit was not filed as a class action. The plaintiffs in this lawsuit have never purported to represent anyone's interests but their own. It is fair for the City to assume that other individuals allegedly injured by the moratorium would have to file lawsuits to vindicate their interests within the applicable statutes of limitations. Yellow joined the action in 1982 to protect its rights; Cooper should have done the same. Instead of following Yellow's lead, [FN6] however, Cooper sat on his class claim for over four years. He should not be able to use the doctrine of intervention to circumvent his dilatory approach to this litigation.

Even if the statute of limitations did not bar Cooper's claims, however, the court finds that his delay of nearly five years to seek intervention clearly demonstrates the "untimeliness" of his claims for the purposes of Rule 24. In an attempt to excuse his extreme tardiness, Cooper asserts that a motion to intervene before the court's ruling on the plaintiffs' motion for partial summary judgment would have been premature, because he did not really "know" of the viability of his claims until this court granted their motion for partial summary judgment. According to Cooper, it was appropriate for him to postpone

attempts at intervention because he did not know whether the court would recognize these claims; and if the court had denied the motion for summary judgment, these claims would have been moot.

Cooper does not cite any cases where the courts have permitted a private plaintiff to stand on the sidelines until another plaintiff has established his claim for him. This argument ignores the fact that this court recognized the viability of these claims in *July of 1983*, when it denied the City's motion to dismiss plaintiffs' § 1983 claims. Furthermore, the court notes that it was the *plaintiffs* who filed the motion for partial summary judgment, not the defendants. Even if the court had denied this motion, it would not necessarily have mooted Cooper's constitutional claims. Accordingly, the court finds that the pendency of a motion for partial summary judgment provides no excuse for Cooper's tardy filing of this motion to intervene. Cf. *Commoner v. du Pont*, 501 F.Supp. 778, 786 (D.Del.1980) (denying motion to intervene filed after plaintiff's motion for summary judgment was denied). Cooper knew of his claims in July of 1982. He cannot sit back and let other private plaintiffs do all the work, and then seek to piggyback his claims onto theirs. [FN7] This motion to intervene should have been filed--if at all-- shortly after the initial suit was filed, or, at the very latest, when the court denied the City's motions to dismiss in July of 1983. See *Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir.1980) (prior court decisions and publicity associated with the case indicate intervenors had sufficient notice of their legal interest in lawsuit). Cooper has no excuse for waiting so long to file his motion, especially when it is clear that he has known of his interest in this litigation since 1982. See *City of Bloomington, Indiana v. Westinghouse Electric Corp.*, slip op. at 8 (intervention sought two years after knowledge of suit found untimely).

## *2. Prejudice to Original Litigating Parties Caused by Delay*

\*7 Cooper alleges that, since his claims are identical to those filed by Flower, there would be no prejudicial delay associated with his intervention in this lawsuit. This assertion ignores the fact that Cooper's complaint, if allowed, would convert a complex civil rights action involving three plaintiffs into a class action lawsuit with over five hundred members. Discovery in the original action has been completed, liability has been determined, and the parties have a briefing schedule for the damages phase of the case. If the motion to intervene is permitted, the original plaintiffs will suffer very

significant additional delays in the resolution of their claims. This delay is a form of "prejudice" to existing parties. 7C Wright, Miller & Kane, *Federal Practice & Procedure*: Civil § 1916 at 441. Cf. *Culbreath*, 630 F.2d at 21-22.

If this motion to intervene were granted, plaintiffs' damage hearing would be delayed indefinitely, until class certification and collateral estoppel or res judicata motions were filed and decided, and discovery in the class action suit was completed. See *Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir.1987) (motion to intervene filed eight days before discovery completed denied as untimely). At the City's request, the court has already delayed the submission of damages evidence until resolution of this motion to intervene. The plaintiffs have pursued this action diligently and shouldered the burden and expense of litigating these claims since the imposition of the moratorium in 1982. They do not deserve to have their claims needlessly delayed by a group of putative plaintiffs who waited nearly five years to attempt to join their lawsuit. If Cooper had filed his claims earlier, these matters could have been decided in an orderly and expeditious fashion. Instead, he delayed his request for joinder until plaintiffs received a favorable ruling, thereby avoiding the risk of being bound by a decision adverse to his interests. See *American Pipe*, 414 U.S. at 547, 94 S.Ct. at 763 (criticizing such "one-way intervention" in context of a class action). Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n. 13, 99 S.Ct. 645, 651 n. 13 (1979) (noting that unexcused failure to join earlier action may preclude use of offensive collateral estoppel). The purpose of intervention is to preserve judicial resources and avoid an unnecessary multiplicity of lawsuits. See *Stallworth v. Monsanto*, 558 F.2d 257, 265 (5th Cir.1977). Cooper's untimely motion to intervene, which would further protract the present litigation, clearly does not fulfill this purpose.

Intervention would also prejudice the City in its defense of these claims. Unlike the situation in *American Pipe*, where the initial complaint informed the defendant of the "number and generic identity of the potential plaintiffs who may participate in the judgment," thereby providing defendants with the "subject matter and size of the prospective litigation," 414 U.S. at 555, 94 S.Ct. at 767, the City has proceeded in this litigation under the assumption that only three plaintiffs were involved. Permitting class action intervention would clearly change the course and complexion of this lawsuit. Although the City was undoubtedly aware of the fact that other people

affected by the moratorium might file suit, this "awareness" does not undercut the prejudice which would result from conversion of this lawsuit into a class action five years after it was filed, and after discovery and liability hearings in the underlying suit have been completed. It would be inequitable to the City to prolong this litigation even further at this late date. See United States v. City of Chicago, 798 F.2d 969, 977 (7th Cir.1986) (intervention prejudicial to the City because it would involve the City in more protracted litigation).

\*8 Intervention would also prejudice the interests of the City because it would force the City to defend against a complex class action which is clearly barred by the statute of limitations. Even if the statute of limitations does not, in and of itself, bar Cooper from filing this class action, asserting a time-barred claim at this late date still constitutes unfair prejudice to the City. The City has a right to assume that, once the limitations period has expired, it will not be subject to any other claims arising out of its alleged unconstitutional actions. A putative plaintiff whose claim is similar to one in the process of litigation cannot allow his claim to expire, and then expect to join diligent plaintiffs simply because his claim is similar to theirs. Intervention is not designed to encourage or condone such dilatory action. Accordingly, the court finds that prejudice to the existing parties counsels against permitting Cooper to bootstrap his class claims to the private claims filed--and litigated--by Flower, Checker and Yellow.

### 3. *Prejudice to the Applicant if Intervention is Denied*

If intervention is denied, Cooper will not be able to advance his claims in another proceeding because the statute of limitations bars him from litigating his class claims independent of this lawsuit. The loss of his claim does not constitute "prejudice" under Rule 24, however. Cooper's dilatory actions caused this claim to expire. In the present case, Flower, Checker and Yellow never purported to represent anyone's interests but their own. It was foolhardy for Cooper to assume that other private parties would fight his battle for him, and somehow prevent the statute of limitations from running against his class claims. See United States v. Jefferson County, 720 F.2d 1511, 1516-17 (11th Cir.1983) ("[intervenors], having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain."); Dodson v. Salvitti, 77 FRD 674, 677 (E.D.Pa.1977) (intervenor should have acted

promptly because there was no duty on the part of existing defendants to protect his interests). In short, the only "prejudice" to Cooper that results from the denial of this motion is the fact that the court has denied him the opportunity to file a time-barred lawsuit against the City. [FN8] This "prejudice" is insufficient to justify his extreme tardiness in filing a motion to intervene. See also United Airlines, Inc. v. McDonald, 432 U.S. at 397- 403, 97 S.Ct. at 2471-2474 (Powell, J., dissenting). [FN9]

### 4. *Unusual Circumstances For or Against Intervention*

There are no unusual circumstances which would warrant intervention at this time. Cooper has not presented any valid justification for his delay in seeking intervention. The age and posture of this lawsuit both provide strong reasons for denying his motion to intervene as untimely.

### *Conclusion*

Cooper filed this motion to intervene on behalf of a class nearly five years after the City imposed its moratorium on the transfer of taxicab licenses. For the reasons set forth above, the court concludes that Cooper's motion not only fails to satisfy the statute of limitations for his § 1983 claims, it also fails to meet the timeliness requirement of Rule 24. Accordingly, the court denies Cooper's motion to intervene.

[FN1. Although Flower is still a plaintiff of record in this case, it did not join the motion for partial summary judgment filed by Checker and Yellow. See Flower Cab II, slip op. at 5 n. 7.

[FN2. Fed.R.Civ.P. 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's

claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene....

Cooper's motion to intervene requests intervention as of right pursuant to Rule 24(a), or alternatively, permissive intervention under Rule 24(b).

FN3. Yellow did not join the suit until after the Seventh Circuit's remand to the District Court in late 1982. *Flower Cab II*, slip op. at 5.

FN4. Cooper obviously knew that his claim against the City arose when he was denied a transfer, and he admits knowledge of the pendency of this action since 1982.

FN5. In *Crown Cork*, the Supreme Court held that the tolling period set forth in *American Pipe* was equally applicable to timely individual suits filed after denial of the class certification motion.

FN6. Cooper remarks that, "[a]lthough Yellow was joined as a party plaintiff after the October, 1982, Court of Appeals decision, it is curious that neither the parties nor the Court, sua sponte, took advantage of Rule 19, F.R.C.P., to bring into action all of the parties who had an interest in the subject matter." Mem. in Supp. of Pet. to Intervene, at 3. This observation ignores the fact that Cooper and his class are neither necessary nor indispensable to this action. Cooper is responsible for taking the initiative to vindicate his rights. The original parties and the court had no duty to suggest their joinder merely because they might be similarly affected by the moratorium.

FN7. Cooper argues that this "knowledge"

factor should be judged not from the time the complaint was filed, but from the time that he learned that the existing parties were no longer representing his interests. See *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir.1977). In *Stallworth*, a group of white employees adversely affected by a settlement of an employment discrimination case sought to intervene after the court approved the settlement. The Fifth Circuit held that their application was timely, because they moved to intervene shortly after they learned that the settlement with black plaintiffs adversely affected their employment relationship with Monsanto. Prior to the entry of the settlement, they were unaware of the impact the litigation would have on their legal interests. *Stallworth*, 558 F.2d at 267.

Unlike the *Stallworth* intervenors, however, Cooper has known of his alleged interest in his litigation since its commencement. He knew that, if he intervened, an adverse ruling in *Flower* could, through the application of res judicata, affect his interest in obtaining relief from the City. He alleges that he relied on Flower (another prospective buyer) to represent his interests for him, and he did not realize that Flower was not representing his interests until he learned, through the March 27, 1987 order, that Flower did not join Yellow and Checker's motions for partial summary judgment. This "excuse" is untenable for three reasons. First, the court's order of July 22, 1983, which set a briefing schedule for the motion for partial summary judgment, clearly states that the motion was filed on behalf of Checker and Yellow only. Thus, even if Cooper were relying on Flower to represent him, this order should have alerted him to the fact that Flower had not joined in the motion. Second, the fact that Flower did not join this motion does not mean that it is no longer a plaintiff in this case. Flower will continue to be a plaintiff until the court dismisses it from the lawsuit. Finally, Cooper has not alleged any justification for his supposition that Flower, a private party, was representing his interests at any time during this lawsuit. The fact that Flower is also a frustrated purchaser of a taxicab medallion does not mean that it had an obligation in this lawsuit to represent any interests other than its own. It did not seek

class certification. Thus, the fact that Flower did not join the motion for summary judgment really has no bearing on when Cooper learned that he had an interest in this litigation.

FN8. Cooper also alleges that his interests will be prejudiced by the collateral estoppel effect of the orders entered in the main action. If Cooper was so concerned with the collateral effects of the *Flower* litigation, then he would have sought joinder in this action much earlier. His allegation of prejudice is inherently inconsistent with his claim that it would have been inappropriate for him to join the action prior to the court's resolution of the plaintiffs' motion for partial summary judgment. Thus, instead of joining the action before the court's ruling (thereby binding himself to the judgment), Cooper apparently waited for favorable results in the *Flower* litigation before seeking to align his claims with it. Any adverse collateral effects stemming from the *Flower* litigation are the result of Cooper's inaction, not the court's denial of his intervention request. Accordingly, the court concludes that this assertion of prejudice does not support allowing Cooper to intervene in this action.

FN9. This action is also distinguishable from *United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977). In *United Air Lines*, the plaintiff, a putative class member, did not seek intervention after the district court denied the class certification motions. She moved to intervene after the district court entered final judgment and it became clear that the named plaintiffs did not intend to file an appeal challenging the denial of the class certification motion. The Supreme Court held that "the intervention [for the purposes of appeal] was timely, because "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representative, she promptly moved to intervene to protect those interests." *Id.* at 394, 97 S.Ct. at 2470. In the present case, it should have been clear to Cooper from the beginning that this was *not* a class action case, and he could not *assume* that the private plaintiffs were representing his interests as well as their own. See *Dodson v. Salvetti*, 77 F.R.D.

674, 677 (E.D.Pa.1977).

Not Reported in F.Supp., 1987 WL 14715 (N.D.Ill.)

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